84-701

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether, under the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, federal jurisdiction to regulate discharges into "wetlands" is limited to areas that support aquatic vegetation only by virtue of "frequent flooding" from adjacent streams, lakes, or seas.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, Allied Aggregate Transportation Company is a respondent in this case. So far as the United States is aware, Allied has no interest in the case separate from that of Riverside Bayview Homes, Inc. Cf. App., *infra*, 22a n.2.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 729 F.2d 391. The judgment order of the district court (App., *infra*, 42a-44a) is unreported. Two previous opinions of the district court (App., *infra*, 22a-31a, 32a-41a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 7, 1984. A petition for rehearing was denied on June 8, 1984 (App., *infra*, 20a-21a). On August 27, 1984, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including November 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

Relevant provisions of the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, and implementing regulations promulgated by the United States Army Corps of Engineers are reprinted at App., *infra*, 45a-48a.

STATEMENT

1. The court of appeals has held that respondent's property is not the kind of "wetland" that is subject to the regulatory jurisdiction of the United States Army Corps of Engineers and hence that respondent may fill in its property without securing a permit under Section 404 of the Clean Water Act of 1977 (CWA), 33 U.S.C. 1344. The issue presented by this case is the extent to which the Nation's "wetlands" are "waters of the United States" within the meaning of Section 502(7) of the CWA, 33 U.S.C. 1362(7), and therefore subject to federal regulatory jurisdiction. Before turning to the facts of this case, we set forth a brief description of "wetlands" generally and the statutory and regulatory scheme for their protection.

a. In general, and not as a strictly legal or jurisdictional matter, wetlands are areas characterized by vegetation growing in soils that are periodically or normally saturated with water. See generally Office of Technology Assessment, Congress of the United States, *OTA-0-206, Wetlands: Their Use and Regulation* (1984) [hereinafter cited as *Wetlands*]; Council on Environmental Quality, *Our Nation's Wetlands, An Interagency Task Force Report* (1978) [hereinafter cited as *Our Nation's Wetlands*]. Familiar types of wetlands are marshes, swamps, and bogs. Wetlands occur along gradually sloping areas between uplands and deep-water environments, such as rivers, or form in basins that are isolated from larger water bodies. *Wetlands* 3. Freshwater wetlands, which account for approximately 90% of total remaining wetlands in the country, may be fed by ground water, surface springs,

streams, runoff from the surrounding terrain, or a combination of these sources. *Our Nation's Wetlands* 10. Water levels in freshwater wetlands rise and recede in part according to rainfall, so that at times they may be quite dry. *Ibid.*

It is widely recognized that wetlands perform unique ecological services. For example, many wetlands purify water by holding nutrients and recycling pollutants, they provide flood protection by retarding surface runoff from rainwater and shielding upland areas from storm damage, and they also provide vital food resources and habitat for fish and wildlife. *Our Nation's Wetlands* 19-27; see also 123 Cong. Rec. 26718-26719 (1977) (remarks of Sen. Baker). In a 1977 congressional debate, it was reported that wetlands provide $140 billion worth of flood protection and water purification services. 123 Cong. Rec. 38994 (1977) (remarks of Rep. Lehman).

b. The Clean Water Act of 1977 is a comprehensive statute designed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).[1] In Section 301(a) of the CWA, 33 U.S.C. 1311(a), Congress enacted an absolute prohibition against the discharge of pollutants into the Nation's waters, excepting only discharges made in compliance with other sections of the Act.

Pursuant to Section 404 of the CWA, 33 U.S.C. 1344, the United States Army Corps of Engineers administers a permit program for the discharge of dredged or

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[1] In 1972, Congress passed extensive amendments to the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, and for the first time established a comprehensive federal program for the control and abatement of water pollution. The 1977 amendments to the FWPCA changed the popular name of the statute to the Clean Water Act. 33 U.S.C. 1251 note. For convenience, we shall refer to the statute by its new name throughout this petition.

fill material into "navigable waters." The statute defines "navigable waters" as "waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). The Corps of Engineers first published regulations further defining "navigable waters" for purposes of the Section 404 permit program on April 3, 1974. 39 Fed. Reg. 12115. Those regulations limited the Corps' jurisdiction under Section 404 to the same waters previously regulated by the Corps pursuant to the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 *et seq*. Thus, "navigable waters" for both Section 404 and Rivers and Harbors Appropriation Act purposes initially were defined by the Corps as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce" (33 C.F.R. 209.120(d)(1) (1974)). Under this definition, commonly referred to as the "traditional" definition of navigable waters, the Corps exercised extremely limited jurisdiction over freshwater wetlands; only wetlands subject to such regular inundation by lacustrine or riverine flow so as to be considered part of a navigable water body were encompassed by the regulations.[2]

The Environmental Protection Agency[3] and several federal courts interpreted the CWA as a congressional assertion of broader federal jurisdiction than would be

[2] In freshwater bodies, only those wetlands below the ordinary high water mark were regulated, and jurisdiction in tidal areas was limited to wetlands below the mean high water mark. 33 C.F.R. 209.260(j) and (k)(ii) (1974).

[3] See 40 C.F.R. 125.1 (1974); *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. 349-351 (1976) (letter from Russell E. Train, EPA Administrator, to Lt. Gen. W.C. Gribble, Jr., Chief, Corps of Engineers).

encompassed by the traditional definition of "navigable waters." *E.g.*, *United States* v. *Holland*, 373 F. Supp. 665, 670-676 (M.D. Fla. 1974). In *NRDC* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), the court held that in the CWA Congress "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act, the term ['navigable waters'] is not limited to the traditional tests of navigability." The court ordered the Corps to publish new regulations "clearly recognizing the full regulatory mandate of the Water Act" (*ibid.*).

In response to the order in *NRDC* v. *Callaway*, the Corps promulgated interim final regulations providing for a phased-in expansion of its Section 404 jurisdiction. 40 Fed. Reg. 31320 (1975); 33 C.F.R. 209.120(d)(2) and (e)(2) (1976).[4] On July 19, 1977, the Corps published its final regulations, in which it revised the 1975 interim final regulations to clarify many of the definitional terms. 42 Fed. Reg. 37122.

Pursuant to the final regulations published in 1977, the Corps' jurisdiction under Section 404 extends to all wetlands that are adjacent to (1) navigable waters as

[4] The Phase 1 regulations, which were made immediately effective, included coastal waters and traditional inland navigable waters and their adjacent wetlands. "Adjacent wetlands" were to be determined by a prevalence of aquatic vegetation and periodic inundation; neither the ordinary high water mark nor the mean high tide line necessarily marked the shoreward limit of jurisdiction. 40 Fed. Reg. 31321, 31324, 31326 (1975). The Phase 2 regulations, which took effect on July 1, 1976, extended the Corps' jurisdiction to lakes and primary tributaries of Phase 1 waters, as well as wetlands adjacent to the lakes and primary tributaries. *Ibid.* The Phase 2 regulations, which took effect on July 1, 1977, extended the Corps' jurisdiction to all remaining areas encompassed by the regulations (*e.g.*, perched or isolated wetlands and wetlands adjacent to tributaries other than primary tributaries). *Ibid.*

traditionally defined, (2) the tributaries of traditional navigable waters, and (3) interstate waters, whether or not navigable, and their tributaries. In addition, certain intrastate lakes or streams and isolated wetlands are subject to the Corps' jurisdiction if the use, degradation, or destruction of those areas could affect interstate commerce. See 33 C.F.R. 323.2(a).[5]

The regulations pertinent to this case provide as follows (33 C.F.R. 323.2(c) and (d)):

> (c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.
>
> (d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

2. Riverside Bayview Homes, Inc., owns approximately 80 acres of property in Macomb County, Michigan, near Lake St. Clair. In November 1976, Riverside submitted an incomplete permit application to fill

[5] The Corps' current definition of "waters of the United States" is a reworded, but substantively unchanged, version of the definition promulgated in 1977. The 1977 definition was amended in 1982 to make it identical to EPA's definition of the same phrase (40 C.F.R. 122.2). See 47 Fed. Reg. 31795 (1982). Thus, the two agencies define "waters of the United States"—and hence the scope of federal regulatory jurisdiction—in the same way for all Clean Water Act programs, regardless of which agency administers a particular program. For this reason, the impact of the decision below may extend beyond the Corps' Section 404 program to the extent that the opinion is read as an invalidation of the administrative definition of "waters of the United States."

a portion of its property. Without completing the application and without waiting for the Corps' decision on its request for a permit, Riverside commenced fill activity. When Riverside refused to comply with a cease and desist order issued by the Corps, the United States initiated this action in the United States District Court for the Eastern District of Michigan, seeking to enjoin Riverside's unauthorized filling of wetlands. Riverside defended its actions by asserting that none of its property was subject to Clean Water Act jurisdiction. Following evidentiary hearings, the district court (then-District Judge Cornelia Kennedy) entered a preliminary injunction and later a permanent injunction prohibiting further filling activity on that portion of the property below the elevation of 575.5 feet until a Corps permit was obtained.

The district court found that the area subject to the injunction was an "adjacent wetland" under the Corps' 1975 interim final regulations.[6] This "wetlands" area is contiguous to Black Creek, a navigable water and tributary of Lake St. Clair. App., *infra*, 23a. It was undisputed that Riverside's property is predominantly vegetated with cattails, marsh grasses, and other wetland plants—*i.e.*, vegetation that is typically adapted for life in saturated soil conditions. *Ibid.* The district court found that, except for periodic surface water inundation from their overflow, the nearby water bodies (Black Creek, Clinton River, and Lake St. Clair)

[6] The relevant interim final regulation provided (33 C.F.R. 209.120(d)(2)(*h*) (1976)): "'Freshwater wetlands' means those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." In relevant part, the final regulation eliminated the words "periodically inundated" and substituted "inundated or saturated by surface or ground water at a frequency and duration sufficient to support * * * [aquatic vegetation]" (33 C.F.R. 323.2(c)). See page 6, *supra*.

are not the cause of the saturated conditions that support the wetlands vegetation found on Riverside's property (*id.* at 25a).[7] Instead, the district court found that the growth of the wetlands vegetation was principally caused by saturation associated with the type of soil found on the property—the soil drains poorly, resulting in a high water table and water on or near the surface (*id.* at 24a-25a). The record reflects that Riverside's property is part of a larger undeveloped area that has exhibited the wetlands characteristics of moisture and vegetation for decades. See, *e.g.*, 1/15/77 Tr. 89, 121-122, 126-127, 134, 158, 185; 1/17/77 Tr. 4-7, 9, 14-15, 29-33. The environmental functions of the area were described by experts as providing habitat for muskrats and birds and furnishing food resources for fish in Lake St. Clair. 1/15/77 Tr. 52-56, 131, 158, 173-174; 1/17/77 Tr. 47, 61.

Having found that Riverside's property is "normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction" (33 C.F.R. 209.120(d)(2)(*h*) (1976)), the district court separately considered the requirement of "periodic inundation" found in the 1975 interim final regulation (*ibid.*). The court had considerable difficulty with this aspect of the regulation (which has since been eliminated to avoid confusion), but ultimately concluded that "periodic" required "more than five" floods (App., *infra*, 31a) and found that the elevation of 574.9 feet

[7] This finding was based on the district court's conclusion that there is no hydrologic connection between Riverside's property and the nearby water bodies (App., *infra*, 32a-37a). In context, however, it is clear that the finding refers to the absence of an underground connection by which water flows from those water bodies to the property. The court made no findings on the reverse question whether surface water drains from the property to the water bodies; the record suggests that it does because the property slopes toward Black Creek. See 1/21/77 Tr. 59, 86; DX 33.

had been surpassed by flooding on six "occurrences" in the last 80 years (*id.* at 30a). By adding half a foot to account for normal monthly fluctuation, the court arrived at its conclusion that Riverside's property below the elevation of 575.5 feet was a "wetland" subject to the Corps' jurisdiction (*id.* at 31a).

Riverside appealed. On motion of the United States, the court of appeals remanded the case to the district court for consideration of the effect of the Corps' 1977 revised final regulations. District Judge Gilmore applied the new regulations to the facts found by Judge Kennedy and again concluded that the area was an adjacent wetland under the regulations. The court permanently enjoined Riverside from filling without a permit. App., *infra*, 42a-44a. Riverside appealed anew.

3. The court of appeals reversed, holding that Riverside's property was not a "wetland" under the 1977 regulations and was not subject to the Corps' jurisdiction under the Clean Water Act (App., *infra*, 1a-19a). The court held that the Corps' jurisdiction over "wetlands" is limited to areas in which aquatic vegetation is caused by frequent flooding from adjacent navigable waters. Applying this test, the court concluded that Riverside's property was not a "wetland" for jurisdictional purposes because inundation by the periodic flooding from adjacent water bodies had not been sufficiently frequent to be the cause of the aquatic vegetation found on the property. App., *infra*, 10a-12a.

The court of appeals initially characterized its "frequent flooding" test as an interpretation of the Corps' revised definition of "wetlands," 33 C.F.R. 323.2(c). The court stated (App., *infra*, 10a):

> The new regulation makes clear that it is the present occurrence of inundation or flooding sufficient to support wetlands vegetation, not the mere presence of vegetation from some other cause, that determines whether a particular area is a wetland. Thus, as we understand it, the presence of inunda-

> tion on the land "as it exists" now, sufficient to cause the growth of aquatic vegetation, is necessary to satisfy the wetlands definition. Neither inundation nor aquatic vegetation would be sufficient, standing alone, to bring a piece of land within the definition. Both must be present, and the latter must be caused by the former.

Although the court quoted a portion of the pertinent regulation at several points in its opinion (App., *infra*, 10a, 11a, 15a), nowhere did it discuss the regulation's applicability to areas characterized by a prevalence of aquatic vegetation that is attributable to saturated soil conditions or ground water (33 C.F.R. 323.2(c)). Instead, the court held that the regulation requires "frequent flooding by waters flowing from 'navigable waters' as defined in the Act" (App., *infra*, 15a).

The court reasoned that its narrow interpretation of the regulation was necessitated by what it perceived as both statutory and constitutional constraints on the Corps' jurisdiction. App,, *infra*, 13a-16a. Because the CWA extends jurisdiction to "*waters* of the United States," the court questioned whether Congress intended to regulate "wet*lands*" at all. *Id.* at 13a (emphasis added). In addition to its view that Congress may not have intended to extend jurisdiction over the property at issue, the court reasoned that its narrow construction was required to avoid the potential problem of an unconstitutional taking (*id.* at 14a-15a).

The government petitioned for rehearing en banc. The petition was denied, but the panel expanded its initial opinion to make clear its view that the Clean Water Act itself, in addition to the Corps' regulation, does not authorize federal jurisdiction over "wetlands" not caused by "frequent flooding" from adjacent navigable waters (App., *infra*, 20a-21a). The government's interpretation of the Clean Water Act, which is reflected in the Corps' regulations, was rejected as "over broad and

inconsistent with the language of the Act in question" (*id.* at 21a).[8]

REASONS FOR GRANTING THE PETITION

The decision below conflicts with the decisions of other circuits, is flatly inconsistent with the intent of Congress, and stands as a serious obstacle to the achievement of Congress's goals. Though the statutory phrase, "waters of the United States," may at first blush be deceiving, even a cursory review of the legislative history of the Clean Water Act, both as it was passed in 1972 and as amended in 1977, quickly and conclusively dispels any notion that Congress intended the Section 404 program to be limited by the traditional concepts of navigability resurrected by the court of appeals. The court's opinion is truly remarkable for its failure to address Congress's purposes in enacting the CWA, the Act's legislative history, or the several decisions of other circuits that have uniformly recognized

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[8] During the pendency of the appeal in this case, the Corps denied Riverside's application for an after-the-fact permit for a 10-acre area filled between May 26, 1976, and January 16, 1977. The after-the-fact permit request was denied based on the Corps' conclusion that "the existing fill has had an adverse impact on the wetland and its function as a flood-water storage area, water quality enhancement basin and fish and wildlife habitat."

In addition to its request for after-the-fact approval of its earlier fill, Riverside sought permission to fill 30.6 more acres. The State of Michigan denied a state permit for this proposed fill. Accordingly, the Corps also refused to approve the proposed work because its regulations (see 33 C.F.R. 325.8(b)) provide that permits will not be granted by District Engineers in the absence of all necessary state and local approvals. Riverside did not seek judicial review of the Corps' permit denials, and the court of appeals did not address the subject, presumably because its ruling on the scope of the Corps' jurisdiction made it unnecessary for Riverside to obtain any Corps permits.

the broad sweep of federal regulatory jurisdiction that Congress intended.

Because the court of appeals' "frequent flooding" test will release millions of acres of wetlands from federal jurisdiction, it threatens adverse effects on water quality, wildlife, and fish resources resulting from the unregulated discharge of dredged or fill material into wetlands. Further, the court of appeals' decision undermines Clean Water Act enforcement by creating inconsistency on a national level and by establishing a jurisdictional test that neither landowners nor regulators can readily apply. Accordingly, review by this Court is warranted.

1. a. The Clean Water Act totally restructured the Nation's efforts to combat water pollution by adopting a strategy of controlling pollution at the point of its discharge. See generally *EPA* v. *California ex rel. State Water Resources Control Board*, 426 U.S. 200, 204-205 (1976). Congress recognized that restricting jurisdiction over water pollution to those relatively few waterways that support navigation would make it impossible to achieve the objectives of the Act.[9] Thus, Congress intentionally deleted the word "navigable" from the Act's definition of "navigable waters" and rejected the Corps' traditional definition of navigable waters as ill-suited to the Act's water quality goals. The Conference Committee explained that (118 Cong. Rec. 33699 (1972) (emphasis added)):

> The Conferees fully intend that the term "navigable waters" be given the *broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.*[10]

See also H.R. Rep. 92-911, 92d Cong., 2d Sess. 131 (1972) ("One term that the Committee was reluctant to define was the term 'navigable waters.' The reluctance was based on the fear that any interpretation would be read narrowly."). Congress thus clearly understood that concepts of navigability have nothing to do with combatting water pollution and that the Act's purposes require a scientific and functional interpretation of "waters of the United States" directly tied to water quality concerns.

Whatever doubt may have existed on this score when the Act was first passed in 1972 was completely laid to rest by the 1977 amendments to the statute. The regulations promulgated by the Corps in response to *NRDC* v. *Callaway*, *supra*, aroused considerable congressional interest. Hearings on the subject of Section 404 jurisdiction were held in both the House and the Senate.[11] An amendment to limit the geographic reach of the Section 404 program to traditional navigable waters and their adjacent wetlands was passed by the House, 123 Cong. Rec. 10434 (1977), defeated on the floor of the Senate, 123 Cong. Rec. 26728 (1977), and eliminated by the Conference Committee. Instead of re-

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[9] The Senate report explained (S. Rep. 92-414, 92d Cong., 1st Sess. 77 (1971)): "Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source."

[10] Regulation of wetlands in order to address environmental problems is undoubtedly within Congress's power under the Commerce Clause. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981); *United States* v. *Byrd*, 609 F.2d 1204, 1209-1210 (7th Cir. 1979).

[11] *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Public Works*, 94th Cong., 2d Sess. (1976); *Development of New Regulations by the Corps of Engineers, Implementing Section 404 of the Federal Water Pollution Control Act Concerning Permits for Disposal of Dredge or Fill Material: Hearings Before the Subcomm. on Water Resources of the House Comm. on Public Works and Transportation*, 94th Cong., 1st Sess. (1975).

stricting the geographic reach of Section 404, Congress amended the statute by exempting certain *activities*—most notably, certain normal agricultural and silvicultural activities—from the Act's permit requirements. See 33 U.S.C. 1344(f).[12]

The legislative history of the 1977 amendments clearly demonstrates Congress's recognition of the importance of wetlands and its intention to protect them under the Clean Water Act regulatory program.[13]

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[12] Congress also added several other provisions to Section 404, including provisions designed to streamline the permit process and to allow states to administer portions of the program. Those amendments, while not pertinent to the issue in this case, demonstrate that Congress thoroughly reexamined Section 404 when it passed the 1977 amendments. In these circumstances, Congress's decision not to alter the geographic reach of the section takes on added significance. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-382 (1982).

[13] For example, Senator Muskie, one of the primary sponsors of the CWA, explained (123 Cong. Rec. 26697 (1977)):

> There has been considerable discussion of section 404 of this act, much of which has been related to the suspicions and fears with respect to that section, and little of which has been related to substantive solutions to real problems while providing an adequate regulatory effort to assure some degree of wetlands protection. There is no question that the systematic destruction of the Nation's wetlands is causing serious, permanent ecological damage. The wetlands and bays, estuaries and deltas are the Nation's most biologically active areas. They represent a principal source of food supply. They are the spawning grounds for much of the fish and shellfish which populate the oceans, and they are passages for numerous upland game fish. They also provide nesting areas for a myriad of species of birds and wildlife.
>
> The unregulated destruction of these areas is a matter which needs to be corrected and which implementation of Section 404 has attempted to achieve.

See also 123 Cong. Rec. 38994-38996 (1977) (remarks of Reps. Ambro, Lehman, and Dingell); 123 Cong. Rec. 26701-26702, 26713, 26716-26717 (1977) (remarks of Sens. Stafford, Hart, and Chaffee).

When Congress rejected the attempt to limit the reach of Section 404, it was well aware that the Corps' 1977 regulations asserted jurisdiction over all adjacent wetlands and some isolated wetlands. See, *e.g.*, S. Rep. 95-370, 95th Cong., 1st Sess. 75 (1977); 123 Cong. Rec. 38967-38968 (1977) (remarks of Rep. Roberts); 123 Cong. Rec. 26718-26719 (1977) (remarks of Sen. Baker). Moreover, Congress specifically referred to "adjacent" "wetlands" as regulated waters in one of the amended Section 404 provisions, 33 U.S.C. 1344(g)(1). Congress's use of this regulatory term of art was an affirmative endorsement of the Corps' interpretation of the scope of its jurisdiction under Section 404. See *Bob Jones University* v. *United States*, No. 81-3 (May 24, 1983), slip op. 24-26; *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969).

The court of appeals' failure to consider the legislative history was improper. See *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 9-10 (1976). This is particularly so because the legislative history so strongly supports the validity of the Corps' interpretation of the statute as reflected in the 1977 regulations. This Court has repeatedly emphasized that reviewing courts are precluded from substituting their judgment for that of an agency, particularly with respect to technical matters or to a determination, including jurisdiction, that has been assigned primarily to the agency administering a statute. See, *e.g.*, *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 5-6; *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 134-135 (1977); *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130-131 (1944).[14] Had the

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[14] The fact that the Corps initially took a narrower view of its jurisdiction under the CWA is of no moment in this case. The Attorney General has determined that the "ultimate administrative authority to determine the reach of the 'navigable waters' for the purposes of § 404" resides with EPA. 43 Op.

court below followed these principles, it would have recognized that its self-created "frequent flooding" test bears no relationship to the water quality concerns that motivated Congress. The positive contributions of wetlands to the integrity of the aquatic system (see page 3, *supra*) are in no way dependent on frequent inundation from overflowing streams or lakes.[15]

b. The court of appeals seriously erred in concluding that its narrow interpretation of Section 404 jurisdic-

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Att'y Gen. No. 15, at 1 (Sept. 5, 1979). As previously noted (see pages 4-5 & n.3, *supra*), EPA has consistently supported a broad interpretation of the scope of Clean Water Act jurisdiction.

[15] Relatively little need be said respecting the court of appeals' interpretation of the Corps' regulation defining "wetlands" (33 C.F.R. 323.2(c)). The court's interpretation was plainly inconsistent with the regulatory language. By virtue of its singular focus on flooding, the court totally ignored the words "saturated" and "ground water" found in the "wetlands" definition. As the preamble to the Corps' regulations explains, "inundation or saturation [of a wetland] may be caused by either surface water, ground water, or a combination of both." 42 Fed. Reg. 37128 (1977). Nowhere in the regulations is there a suggestion that the water inundating or saturating an area must flow from a lake or stream. Furthermore, the court of appeals failed to heed the well-established principle that an agency's interpretation of its own regulations is entitled to deference by a reviewing court, particularly where, as here, technical expertise is involved. *E.g.*, *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 556 (1980); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

In short, the prevalence of wetland vegetation attributable to saturated soil conditions brings Riverside's property within the regulatory definition of wetlands. Because the property is adjacent to Black Creek, it falls within the regulatory definition of "waters of the United States," 33 C.F.R. 323.2(a) and (d). The court's concern (App., *infra*, 21a) that the Corps was attempting to regulate "low lying backyards" was entirely misplaced. Although the wetlands vegetation on Riverside's property is not attributable to inundation from the adjacent navigable waters, it is undisputed that the property serves precisely the type of critical ecological functions that Congress intended to protect. See page 8, *supra*.

tion was required by the Takings Clause of the Fifth Amendment. The fundamental flaw in the court's "taking" analysis was its erroneous assumption that the mere assertion of Section 404 jurisdiction amounts to the prohibition of "any development or change of such property." App., *infra*, 14a. In fact, however, the scope of Section 404 jurisdiction determines nothing more than whether the owner of a wetland must obtain a permit before discharging pollutants onto his property. Moreover, the statute and the implementing regulations expressly contemplate the granting of permits in appropriate circumstances, see 33 U.S.C. 1344(b); 33 C.F.R. Pts. 320, 323; 40 C.F.R. Pt. 230, and, even if a permit is denied, it does not follow that all economically viable uses of the property will be foreclosed. See *Avoyelles Sportsmen's League* v. *Marsh*, 715 F.2d 897, 927 (5th Cir. 1983); *United States* v. *Byrd*, 609 F.2d 1204, 1211 (7th Cir. 1979); cf. *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-296 (1981).[16]

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[16] The sole authority for the court of appeals' "taking" analysis, *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979) (App., *infra*, 14a-15a), nowhere suggests that a narrow view of federal regulatory jurisdiction is required to avoid a taking "problem." In fact, *Kaiser Aetna* supports the opposite conclusion. There, this Court explicitly acknowledged that a privately-owned lagoon converted by its owners into a navigable water was subject to federal regulatory jurisdiction. 444 U.S. at 174, 179. It was only the government's attempt to require the owners to provide the public with free access to the lagoon that amounted to a "taking" for which compensation would be due because the access requirement would have deprived the owners of "the 'right to exclude,' so universally held to be a fundamental element of the property right" (*id.* at 179-180 (footnote omitted)). Subsequently, the Court refused to apply *Kaiser Aetna* to a land use regulation that, like the permit requirements of the Clean Water Act, did not extinguish any "fundamental attribute of ownership." *Agins* v. *City of Tiburon*, 447 U.S. 255, 262 (1980).

A "taking" of private property cannot arise from the mere assertion of regulatory authority to require an application for a permit. Moreover, even if a permit is denied, and a taking has been established, no constitutional violation occurs unless just compensation is unavailable. See, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 27-28; *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 297 n.40; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 127, 149 (1974); *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932). Thus, the court of appeals clearly erred in invalidating significant portions of the Section 404 regulatory program in the absence of any conclusion (which would have found no support in the law in any event) that a landowner whose permit application is denied may not bring an inverse condemnation action.[17]

Finally, the taking analysis in any particular case is fundamentally factual. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 295; *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979). In a Section 404 case, for example, the court would have to determine, inter alia, whether denial of a permit deprived the landowner of all economically viable uses of his land. See, *e.g.*, *Deltona Corp.* v. *United States*, 657 F.2d 1184, 1191-1193 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982). The court of appeals conducted no such inquiry in this case, and thus its taking concerns were wholly speculative.[18]

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[17] Of course, a landowner may also obtain judicial review, pursuant to the Administrative Procedure Act, 5 U.S.C. 702, of a Corps decision to deny a permit application. See, *e.g. Buttrey* v. *United States*, 690 F.2d 1170, 1183 (5th Cir. 1982), cert. denied, No. 82-1303 (May 16, 1983); *Deltona Corp.* v. *Alexander*, 682 F.2d 888 (11th Cir. 1982).

[18] As noted (see note 8, *supra*), Riverside applied for and was denied a permit while this case was pending in the court of appeals. But the court of appeals did not decide whether the permit denial was proper or whether it effected a taking in the circumstances of this case, nor could the court have considered these questions inasmuch as Riverside never challenged the denial of the permit.

2. Although it acknowledged in a footnote devoid of any discussion (App., *infra*, 13a n.4) that the Fifth Circuit has recently upheld the Corps' definition of wetlands (see *Avoyelles Sportsmen's League* v. *Marsh*, *supra*), the court below seemingly approached the issue before it as though it were a question of first impression. In fact, it is not, and, what is more, every other circuit to address the matter (either in the context of Section 404 or of other sections of the CWA that apply to "waters of the United States") has concluded that Congress intended in the CWA to assert jurisdiction over the Nation's waters to the full extent of its power under the Commerce Clause and that the implementing regulations faithfully reflect that intent. See, *e.g.*, *Utah* v. *Marsh*, 740 F.2d 799, 802-804 (10th Cir. 1984); *Avoyelles Sportsmen's League* v. *Marsh*, 715 F.2d at 914-916; *United States* v. *Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States* v. *Byrd*, 609 F.2d at 1209-1211; *Leslie Salt Co.* v. *Froehlke*, 578 F.2d 742, 754-756 (9th Cir. 1978); cf. *Consolidation Coal Co.* v. *Costle*, 604 F.2d 239, 243 (4th Cir. 1979).

These courts have all recognized that Congress's purposes, described at pages 3, 12-13, *supra*, would be severely frustrated by an interpretation of "waters of the United States" that excluded areas, including wetlands, the destruction or pollution of which could threaten the purity of the more traditional waters to which the court below confined its concern. The result of this conflict in the circuits, unless resolved, will be inconsistent appli-

cation of the nationwide Section 404 program, to the detriment of landowners and regulators alike. See pages 21-22, *infra*.[19]

3. a. The court of appeals' decision threatens to cause significant environmental damage by allowing unregulated discharges into critical wetlands. In deciding whether to grant or deny a permit request, the Corps carefully reviews the environmental risks posed by dumping dredged or fill material into a wetland within its jurisdiction pursuant to criteria (40 C.F.R. Pt. 230) established by the EPA under Section 404(b) of the Act, 33 U.S.C. 1344(b). In the permit review process, the ecological importance of the particular wetland and the impacts of the proposed activity are evaluated, as well as the need for the project; permits may be granted, denied, or conditioned to reduce adverse consequences of the proposal. On average, two-thirds of all permits that are granted include conditions requiring best management practices or other measures to mitigate adverse effects on water resources, including wetlands. *Wetlands* 12. The permit review process, therefore, prevents the unnecessary pollution or destruction of wetlands important to the maintenance of water quality. See 33 U.S.C. 1344(b); 40 C.F.R. 230.10; 33 C.F.R. 320.4(a) and (b). The court of appeals' contraction of jurisdiction wholly pretermits this review process and will inevitably lead to water pollution and destruction of wetlands that would not otherwise occur.

[19] In addition, the problem is compounded by the fact that the regulations at issue were initially promulgated in response to a court order. See page 5, *supra*. Even if we thought that the decision below were correct, which we do not, it seems doubtful that the Corps could amend its regulations to conform to the court of appeals' ruling without risking additional litigation challenging any new regulations as inconsistent with the mandate of *NRDC* v. *Callaway*, *supra*. Thus, the conflict in the circuits cannot be resolved administratively.

Indeed, the Corps has estimated that the court of appeals' "frequent flooding" test will release 2,128,000 acres of wetlands within the Sixth Circuit from the protection of the Clean Water Act; this acreage amounts to 48% of the wetlands previously thought to be within the Corps' jurisdiction within the Sixth Circuit.

b. Effective implementation of the Section 404 regulatory program will be substantially undermined by the court of appeals' decision. Approximately 11,000 Section 404 permit applications are filed each year. These applications are processed by the Corps' 40 district offices throughout the country. Due to the magnitude of the program and its decentralized administration, effective implementation of Section 404 is highly dependent on voluntary compliance by landowners, which in turn requires a clear, easily-applied jurisdictional test. In contrast to the relative ease with which the jurisdictional test set forth in the Corps' regulations can be applied to particular parcels of land, however, the court of appeals' "frequent flooding" test is dependent upon highiy technical, hydrologic data not readily accessible to landowners or regulators. As a practical matter, it will be difficult for landowners and regulators to isolate the inundation required by the court's decision from other factors affecting the wetness of an area. In effect, the court's decision requires a potential permit applicant to hire hydrologists to assess the existence, the frequency, and the direction of the flow of water. In these circumstances, public cooperation in the voluntary implementation of the program will inevitably be jeopardized. For the same reasons, the Corps' ability to enforce Section 404, by detecting violations and advising landowners of permit requirements, will be unduly complicated.[20] Accordingly, clarification of the appro-

[20] The court of appeals' decision creates other cumbersome management problems for the Corps. The conflict between the court's decision and the Corps' regulations, fully applicable in

priate test for wetlands jurisdiction is required for the benefit of landowners and regulators alike.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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other circuits, will require the Corps to administer a nationwide program using inconsistent standards. Because the Corps' district offices that manage the permit program are divided by watershed, eight such offices overlap a Sixth Circuit state and a state in another circuit. Consequently, regulators in those eight offices will be forced to apply both the Corps' regulations and the court of appeals' "frequent flooding" test.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 81-1405
81-1498

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE, CROSS-APPELLANT,

v.

RIVERSIDE BAYVIEW HOMES, INC.,
A MICHIGAN CORPORATION, AND
ALLIED AGGREGATE TRANSPORTATION COMPANY,
A MICHIGAN CORPORATION,
DEFENDANTS-APPELLANTS, CROSS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Decided and Filed March 7, 1984

Before: MERRITT and MARTIN, Circuit Judges; WEICK, Senior Circuit Judge.

MERRITT, Circuit Judge. This is an environmental case concerning "wetlands" and the jurisdiction of the United States Army Corps of Engineers over them. The government claims that defendants, Riverside Bayview Homes, Inc., and Allied Aggregate Transportation Company, violated section 301(a) of the Federal Water Pollution Control Act, 33 U.S.C. § 1311(a) (1976), and regulations concerning "wetlands" purportedly issued under that Act. The claimed violation

occurred when the defendants deposited fill material on Riverside's land, which the government asserts is a "wetland," without obtaining a permit from the Corps of Engineers as required by the Act. Judge Cornelia Kennedy, sitting as a District Judge, issued a permanent injunction prohibiting further filling on a large portion of Riverside's property and a declaratory judgment holding one of the Corps regulations unconstitutional. Both parties then appealed.

On the first appeal, this Court remanded the case for further proceedings in the District Court in light of a new regulation promulgated by the Corps. That regulation, found at 33 C.F.R. § 323.2(c) (1983), specifically altered the definition of "wetlands" relied upon by Judge Kennedy in the original District Court proceeding. We conclude that the District Court on remand erred in interpreting the new definition of wetlands to include defendant's property and in continuing the permanent injunction under the new regulation. We also vacate as moot the declaratory judgment issued by the District Court in the first proceeding.

I. THE LAND IN QUESTION

Riverside owns approximately eighty acres of undeveloped land north of Detroit in Harrison Township, Michigan, which it had planned to develop for housing. It is located in a suburban area approximately a mile west of Lake St. Clair and south of South River Road, roughly paralleling the Clinton River. Its southern boundary is separated from the man-made Savan Drain by two ten-acre parcels. Its western boundary is formed by Jefferson Avenue, a heavily travelled road.[1]

Riverside's property comprises one sixty-acre parcel and a partially adjoining twenty-acre parcel. The sixty

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[1] For a pictorial depiction of the property, see the Appendix to this opinion.

acres running along Jefferson Avenue were actively farmed in the past. In 1916, the sixty-acre tract was platted as a subdivision, and storm drains and fire hydrants were installed. The remaining twenty-acre parcel was neither platted nor improved. In the early and mid-1950's, some efforts were made by the owner to develop the platted subdivision. In 1960, the newly-formed Riverside Corporation bought the property. According to Riverside, its efforts to develop the property along with the surrounding area during the 1960's were stymied by an adjacent property owner who blocked an effort to reroute a street dissecting the property, and by a local zoning ordinance which forced it to fill the property to a specific elevation.

In 1973, unprecedented high water levels on the Great Lakes, including Lake St. Clair, located a mile east of the Riverside land, prompted emergency action by Harrison Township and the Corps of Engineers to protect area homes and businesses from water damage. Emergency measures included building a semicircular dike which dissected the twenty-acre parcel and extended southeast across the sixty-acre tract, and filling a ditch along Jefferson Avenue with dirt, thereby destroying the drainage on the western border of the property.

In furtherance of its development plans, Riverside contracted with Allied Aggregate Transportation Company in the fall of 1976 to have dirt fill hauled to the property. It was unclear whether or not the land would be subject to the Corps' regulatory jurisdicton. Accordingly, a Riverside stockholder met with Corps personnel to discuss whether a permit must be obtained in order to proceed with filling the land. Riverside submitted an incomplete application for a permit in November, 1976.

Before the permit application had been acted on by the Corps, Riverside began placing fill on the property

north of the dike. On December 22, 1976, Riverside was ordered by the Corps to cease and desist from further filling. When Riverside continued to fill, the Corps asked the United States Attorney to bring this enforcement proceeding.

On January 7, 1977, the District Court entered a temporary restraining order prohibiting Riverside and Allied from engaging in further filling, pending a full evidentiary hearing. After that hearing, which encompassed seven days of testimony, Judge Kennedy issued an opinion granting the government's motion for a preliminary injunction. Judge Kennedy also held unconstitutional a Corps regulation requiring the processing of an application for a permit to be postponed once the United States Attorney has begun enforcement proceedings. On June 20, 1979, the District Judge issued the court's final judgment holding a large portion of Riverside's land to be a wetland subject to Corps regulation under the Federal Water Pollution Control Act. Judge Kennedy permanently enjoined further filling on that portion of the property until the Corps issues a permit to Riverside. At the same time, she issued an order holding defendants in contempt of court because they had continued to fill the property. The defendants were ordered to remove the fill, which they have apparently done. Since that time, Riverside's application for a Corps permit has been processed and denied.

II. THE WETLANDS DETERMINATION

A. Statutory and Regulatory Background

The Federal Water Pollution Control Act was enacted to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (1976). The Act declares that "it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." *Id.* § 1251(a)(1). Section 301 of the Act states that, except as permitted under certain exceptions, "the discharge

of any pollutant by any person shall be unlawful." *Id.* § 1311(a). One of the express exceptions to this rule is contained in section 404, 33 U.S.C. § 1344, which authorizes the Corps to issue permits for the disposal of dredged or fill materials into "navigable waters."

The Act contemplates that applications for section 404 permits are to be evaluated by the Corps under regulations developed jointly by the Environmental Protection Agency and the Corps. *See id.* § 1344(b); 40 C.F.R. § 230 (1983). These regulations are supposed to identify the factors to be used in determining whether filling will have an adverse impact on water quality. A person who fills or otherwise discharges pollutants into "navigable waters" without a permit subjects himself to civil or criminal penalties. *See* 33 U.S.C. § 1344(h)(1)(G) (violations of permit program entail "civil and criminal penalties and other ways and means of enforcement").

The "navigable waters" which the Federal Water Pollution Control Act was meant to protect are defined in the Act as "the waters of the United States, including the Territorial seas."[2] *Id.* § 1362(7). The Act does not mention or define "wetlands." The Corps and the EPA, however, developed regulations pursuant to the Act covering areas denominated as "wetlands" as well as the congressionally specified "navigable waters." These regulations, including the permit procedures noted above, seek to prohibit tampering with wetlands without the express permission of the agencies.

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[2] The term "Territorial seas" is defined as "the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles." *Id.* § 1362(8).

B. The Wetlands Definition

At the time that this action was initially brought, the Corps regulation defined wetlands and provided that a permit must be obtained for filling of

> Freshwater wetlands including marshes, shallows, swamps and similar areas that are contiguous or adjacent to other [sic] navigable waters and that support freshwater vegetation. "Freshwater wetlands" means those areas that are [1] *periodically inundated* and that [2] are normally characterized by the prevalence of *vegetation that requires saturated soil conditions* for growth and reproduction.

33 C.F.R. § 209.120(d)(2)(i)(h) (1976) (emphasis added).

The question before the District Court in the initial proceeding was whether the Riverside land possessed the characteristics set forth in the above definition and thus should be classified as a wetland subject to the Corps' regulatory jurisdiction. Judge Kennedy found that the land was contiguous to a navigable water, Black Creek, which is a tributary of Lake St. Clair. Furthermore, she found that because of the type of soil found on the land, the unfilled Riverside property was "characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." These two aspects of the wetlands definition having been satisfied, the District Court focused on the question of whether the land was "periodically inundated."

Judge Kennedy's resolution of this issue was based on what she admitted was an unavoidably "arbitrary" interpretation of the term "periodic" as it is used in the Corps regulation. She accepted the standard dictionary definition, "flooded," as the meaning of "inundated," but was compelled to rely on a rough statistical plotting of the potential for flooding of the Riverside land in order to determine whether it was "periodically inundated," or flooded on a "periodic" basis.

Judge Kennedy found that the Riverside land was rarely if ever inundated. From testimony concerning Lake St. Clair which established that a water level of 575.0 feet would be reached or surpassed only about two percent of the time, she concluded that it was difficult to ascertain whether the Riverside land south and east of the contour line of 575.5 feet was ever flooded. She explained:

> The mean of the elevations on the south and east of defendants' property is 574.6, ranging from 575.70 to 574.45. Using the monthly mean level of Lake St. Clair ... and adding six inches, the normal variation, it is immediately apparent that *there have been long periods of time when none of the property was inundated by water from contiguous or adjacent navigable waters. Indeed, this has been true most of the time.*

Opinion and Order Granting Motion for Preliminary Injunction in Part at 6 (emphasis added). Judge Kennedy noted that the high-water levels in the period from 1973-75 were unprecedented. From this and other statistical information, she extrapolated that "there have been periods in only 14 of the 80 years of recorded lake levels in which the monthly mean inundated the property, — or, 17% of the time," and that "[s]ome of the higher elevations have been inundated only during the last recent unprecedented high water or *have never been inundated.*" *Id.* (emphasis added).

Despite these misgivings, Judge Kennedy found that there was sufficient evidence from which to conclude that the land had been "inundated." Accordingly, she then turned to the question of whether that inundation was "periodic," observing that "[t]he Court is left in the unenviable position of having to define 'periodic' without knowing the reason for the adoption of this standard." *Id.* at 7. She found that the Riverside land at the contour line of 575.5 feet above sea level had been inundated on four to six occasions in the past eighty years.

Acknowledging that there was no precedent for her analysis, Judge Kennedy reasoned:

> If treating the years 1972-1975 and 1952-1953, as one occurrence, then the lake levels have exceeded 575 feet only four times (1928, 1952-1953, 1969 and 1972-1975). If the level of 574.9 feet were to be considered, the number of occurrences would increase to six . . . [I]t is clear that determining the level at which the inundation would be considered "periodic" is difficult and perhaps somewhat arbitrary. The Court must choose the point at which an occurrence became periodic. It has selected more than five. It therefore determines that the appropriate level is 575 feet, plus the half-foot of normal monthly fluctuation [of the mean high water level of Lake St. Clair] above the mean.

Id. On this basis, the District Court enjoined Riverside from placing fill below the 575.5 foot contour line without first obtaining a Corps permit. Under this ruling, some eighty percent of the land was denominated as a "wetland," and therefore was not usable as contemplated by the landowner without the government's permission.

In 1977, after Judge Kennedy's initial permanent injunction was issued, the Corps wetlands definition on which the ruling was based was repealed and replaced. Wetlands are now defined as

> those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in [saturated] soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R. § 323.2(c) (1983).

In the preamble to the new regulations, the Corps explained that the wetlands definition had been changed "to eliminate several problems and achieve

certain results." The reference to "periodic inundation" was deleted because

> [m]any interpreted that term as requiring inundation over a record period of years. Section 404 is intended to regulate discharges of dredged or fill material into the acquatic system *as it exists*, and not as it may have existed over a record period of time.

42 Fed. Reg. 37128 (July 19, 1977) (emphasis added). The preamble goes on to indicate that the new definition "pertains to an existing wetland and requires that the area be inundated or saturated by water at a frequency and duration sufficient to support aquatic vegetation." *Id.*

For similar reasons, the Corps also eliminated the term "normally" in the wetlands definition, replacing it with the phrase, "and that under normal circumstances do support." The preamble notes that the term "normally" was used in the original version of the definition "to respond to those situations in which an individual would attempt to eliminate the permit review requirement of Section 404 by destroying the aquatic vegetation, and to *those areas that are not aquatic but experience an abnormal presence of aquatic vegetation.*" *Id.* (emphasis added). Significantly, the preamble notes that it is still the case under the new regulation that "[t]he abnormal presence of aquatic vegetation in a non-acquatic area would not be sufficient to include that area within the Section 404 program." *Id.*

III. APPLICATION OF WETLANDS REGULATIONS TO FACTS

The changes in the Corps wetlands definition meant that the task before Judge Gilmore was essentially that of applying this new definition to the facts as found by Judge Kennedy in the earlier proceeding to determine whether the Riverside property below the elevation of 575.5 feet above sea level is or is not a wetland. Our order remanding this case to the District Court for fur-

ther examination in light of the new regulation did not make the nature of the inquiry clear, however. We did not point out to Judge Gilmore precisely what we expected him to do.

We should have directed the District Court to consider the voluminous evidence from the seven days of testimony given earlier and to make a finding as to whether the Riverside property to the south and east of the contour line of an elevation of 575.5 feet, *as it exists* now, should be classified as a wetland. Instead, in the absence of clear directions, the District Judge on remand simply found from a common-sense reading of the new language that the amended regulation was "broader than its predecessor." Presumably, his reasoning from there was that, since Judge Kennedy had found that the property was "periodically inundated," and since it does support some aquatic vegetation, it must therefore be inundated "at a frequency and duration sufficient to support, and that under normal circumstances [does] support" wetlands vegetation.

It does not necessarily follow, however, that because an area has been flooded five times in more than eighty years that, "as it exists" now, it is "inundated at a frequency and duration sufficient to support and that under normal circumstances [does] support" wetlands vegetation. The new regulation makes clear that it is the present occurrence of inundation or flooding sufficient to support wetlands vegetation, not the mere presence of such vegetation from some other cause, that determines whether a particular area is a wetland. Thus, as we understand it, the presence of inundation on the land "as it exists" now, sufficient to cause the growth of aquatic vegetation, is necessary to satisfy the wetlands definition. Neither inundation nor aquatic vegetation would be sufficient, standing alone, to bring a piece of land within the definition. Both must be present, and the latter must be caused by the former.

Were this not so, then areas which inexplicably support some species of aquatic vegetation, but which are not normally inundated, would fall within the wetlands definition. Such a perverse result could not have been what the Corps contemplated promulgating the regulation. Indeed, as noted earlier, the Corps expressly adverted to the situation of "areas that are not aquatic but experience an abnormal presence of aquatic vegetation" and emphasized that such lands were not intended to be covered by the regulations.

Turning now to the facts as found by Judge Kennedy, and applying our interpretation of the new wetlands definition to those facts, we conclude that the Riverside land is not a wetland. We note at the outset that Judge Kennedy did not find that the land, "as it exists" now, is inundated. Nor is there evidence in the record to support such a finding. After examining the evidence, Judge Kennedy found that the land had only been flooded on four to six occasions in the eighty years of recorded history of the area. Although flooding of such infrequency might properly be called "periodic," it cannot fairly be said that it describes the land "as it exists."

Judge Kennedy did find that, quoting from the old regulation, the Riverside land was characterized "by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." Significantly, however, she found that the source of this vegetation was the type of soil found on the property and not the few instances of flooding. The evidence supports her determination that the infrequent inundation caused by the adjacent navigable water, Black Creek, was not the cause of the wetland vegetation. Thus she did not find, and on the evidence presented could not have found, that the land, as it exists now, is "inundated at a frequency and duration sufficient to support, and that under normal circumstances [does] support"

the wetlands vegetation. Nor did she consider or make any findings concerning the question whether the Riverside land fits the Corps definition of an area which is technically not a wetland, because it is not inundated, but which experiences an abnormal presence of aquatic vegetation.[3]

In the absence of evidence that the property as it exists now is frequently flooded and that the flooding causes aquatic vegetation to grow there, the government's case is insufficient to justify a classification of this property as a wetland subject to the jurisdiction of the Corps of Engineers. The injunction is therefore vacated.

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[3] There was evidence adduced during the evidentiary hearing which strongly indicated that the Riverside land may fit within this category of land which is "not aquatic but experience[s] an abnormal presence of aquatic vegetation." Not only was the land farmed for many years, it has been established that there are many species of vegetation growing there now that could not be classified as purely wetlands vegetation. For example, it is significant that on cross-examintion by Riverside's attorney, the government's main witness admitted that the "only positive knowledge" he had about the vegetation on the land was that there were cattails. *See* Government's App. at 75. Furthermore, this witness testified that in addition to cattails, phragmites, marsh grasses and other wetland-type vegetation, he discovered ash, red maple, cottonwood, and sedge on the property. He admitted that these were not necessarily wetland-type vegetation. We do not find that Judge Kennedy's finding that there was a "prevalence" of wetland-type vegetation on the property was clearly erroneous; rather, we simply note that her finding to that effect was based on the old regulation and did not go to the issue of whether the presence of wetland-type vegetation on the land was "abnormal" in the sense that it was supported not by inundation but by unusual soil conditions.

IV. NARROW INTERPRETATION OF "WETLANDS" REGULATION NECESSARY

In deciding that the District Court erred on remand in failing properly to assess the impact of the new wetlands definition upon Judge Kennedy's earlier wetlands determination, we construe the regulation containing the definition somewhat narrowly in order to avoid serious questions concerning the validity of the definition itself under the Act. In delegating authority to the Corps under the Federal Water Pollution Control Act, Congress defined the subject matter intended to be protected by the statute as the "navigable waters." Section 502(f) defines "navigable waters" as "waters of the United States including the Territorial seas." The language of the statute makes no reference to "lands" or "wetlands" or flooded areas at all.

Congress may, indeed, have meant to extend the protections of the Act beyond the straightforward definition it provided of "navigable waters."[4] The question, however, is how far away from "navigable waters" Congress contemplated that the regulations under the Act could drift. It is certainly not clear from the statute that the Corps' jurisdiction goes beyond navigable wates and perhaps the bays, swamps, and marshes into which those navigable waters flow. Neither is it clear that Congress intended to subject to the permit requirement inland property which is rarely if ever flooded. Nor is it clear that the statute was intended to cover a piece of property a mile inland from Lake St. Clair which has been farmed in the past and is now

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[4] We note that the Fifth Circuit has recently held that the Corps' wetlands definition is consistent with the intent of the Federal Water Pollution Control Act. *See Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897 (5th Cir. 1983).

platted and laid out for subdivision development with the fire hydrants and storm sewers already installed.

To prohibit any development or change of such property by the landowner raises a serious taking problem under the fifth amendment. It is well established that government regulation can effect a fifth amendment taking. The rationale, as stated by Justice Brennan, is that "[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property." *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting). Recently, in *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), the Supreme Court addressed a problem markedly similar to this one and declared:

> Although the Government is clearly correct in maintaining that the now dredged Kuapa Pond falls within the definition of "navigable waters" as this Court has used that term in delimiting the boundaries of Congress' regulatory authority under the Commerce Clause, ... this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation.

Id. at 172 (citations omitted). In *Kaiser Aetna*, the Supreme Court found that the government's attempt to create a public right of access to a pond which was improved so as to be capable of supporting navigation but had always been considered private property "goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking...." *Id.* at 178 (citing *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922)). The Court found the *Kaiser Aetna* petitioners' interest in their dredged marina-style subdivision community which included Kuapa Pond "strikingly similar"

to that of owners of fast land adjacent to navigable water, like Riverside, noting that there was no doubt that "when the Government wishe[s] to acquire fast lands, it [is] required by the Eminent Domain clause of the Fifth Amendment to condemn and pay fair value for that interest." *Id.* at 177. The Court concluded:

> [I]f the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have [in developing it as a private subdivision] it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond while petitioners' agreement with their customers calls for an annual $72 regular fee.

Id. at 180.

The parallels between *Kaiser Aetna* and this case are obvious and hardly require elaboration. We note only that we see a very real taking problem with the exercise of such apparently unbounded jurisdiction by the Corps, a problem we avoid by construing the regulation containing the amended wetlands definition as limited to lands such as swamps, marshes, and bogs that are so frequently flooded by waters from adjacent streams and seas subject to the jurisdiction of the Corps that it is not unreasonable to classify them as lands which frequently underlie the "waters of the United States." *See* 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 45.11, at 33-34 (C. Sands ed. 1973) (discussing presumption of constitutionality of statutes).

Accordingly, we interpret the words "inundated at a frequency and duration sufficient to support, and that under normal circumstances [does] support [wetlands vegetation]" as set forth in the amended regulation to require frequent flooding by waters flowing from "navigable waters" as defined in the Act. The definition thus covers marshes, swamps, and bogs directly created by such waters, but not inland low-lying areas such as the

one in question here that sometimes become saturated with water.

V. THE DECLARATORY JUDGMENT

During the two and one-half years of litigation of the issue of the Corps' jurisdiction over Riverside's property, the Corps declined to process an application for a permit to fill the area in question. The agency was precluded by regulation from acting on Riverside's application because the United States Attorney had initiated enforcement proceedings after it was discovered that Riverside was engaged in unauthorized filling. The Corps regulation provides:

> If the District Engineer refers a case to the local U.S. Attorney or if criminal and/or civil action is instituted against the responsible person for any unauthorized activity, the District Engineer shall not accept for processing any application for a Department of the Army permit until final disposition of the referral acton and/or all judicial proceedings, including the payment of all prescribed penalties and fines and/or completion of all work ordered by the court. Thereafter, the District Engineer may accept an application for a permit; provided, that with respect to any judicial order requiring partial or total restoration of an area, the District Engineer, if so ordered by the court, shall supervise this restoration effort and may allow the responsible persons to apply for a permit for only that portion of the unauthorized activity for which restoration has not been so ordered.

33 C.F.R. § 326.4(e) (1982) (current version as amended at 33 C.F.R. § 326.3(c)(3) & n.2 (1983)).

Riverside asked the District Court in the initial enforcement proceeding to issue a declaratory judgment declaring this regulation to be unconstitutional as a de facto taking of Riverside's property. In a memorandum opinion, Judge Kennedy held that the postponement of processing of Riverside's application for a permit under

the regulation "effect[s] a quasi-taking of property unless and until a person relinquishes any right the person may have to engage in litigation with the Corps of Engineers." Opinion of the Court at 9. Moreover, Judge Kennedy held that the deferral was a sanction unauthorized by the section of the Federal Water Pollution Control Act which gives the Corps the authority to promulgate regulations to carry out its functions. *Id.*

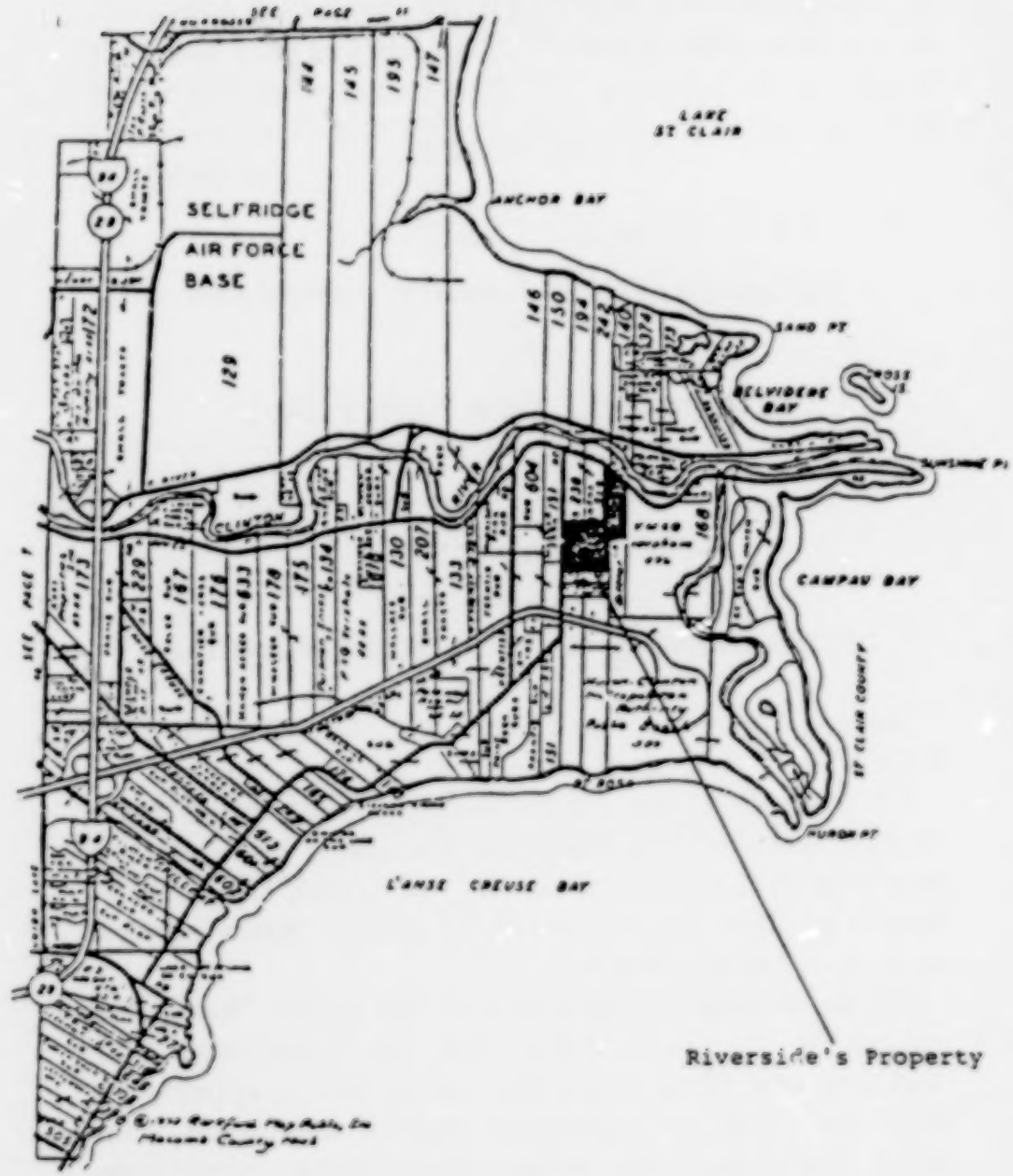
Judge Kennedy interpreted the regulation as denying defendant "the right to litigate the constitutionality of a statute or regulation on peril of losing its rights to pursue its administrative adjudication remedies." *See id.* Apparently, she understood the regulation to compel the defendant to choose between litigating his claim that the regulation effects an unconstitutional taking of his property, and proceeding with his application for an after-the-fact permit which, if granted, would enable him to continue with his development project.

Riverside's opposition to the regulation postponing the permit process cannot alter the fact that nothing in the regulation now adversely affects its interest. We construed the Corps wetlands definition narrowly and concluded that Riverside's property is not a wetland and that, therefore, the Corps has no jurisdiction over it. Riverside is now free to develop its land as it wishes. Moreover, the challenged regulation has since been amended to suggest a strong presumption in favor of processing applications for after-the fact permits. *See* 33 C.F.R. § 326.3 & n.2 (district engineer shall accept application for after-the-fact permit for unauthorized filling unless state or local enforcement action is pending, and "[t]his exception to the general rule of accepting after-the-fact applications should be used on a limited basis, only for those cases which merit special treatment"). Therefore, the question is moot.

The problem before us clearly is not "capable of repetition, yet evading review." *See Moore* v. *Ogilvie*, 394

U.S. 814, 816 (1969) (case concerning burden placed on nomination process for statewide office was not moot but was "capable of repetition, yet evading review," because same restriction on plaintiff's candidacy that had adversely affected him in 1968 could do so in 1972 election); *International Longshoreman's and Warehouseman's Union* v. *Boyd*, 347 U.S. 222 (1954) (declaratory judgment vacated because questions of scope and constitutionality of legislation must not be decided "in advance of its immediate adverse effect in the context of a concrete case."). We should not pass unnecessarily on the constitutionality of the Corps regulation. The declaratory judgment of the District Court is therefore vacated and the claim dismissed.

APPENDIX[5]



[5] Exhibit A, Defendant's Memorandum of Law, *United States* v. *Riverside Bayview Homes, Inc.*, No. 770041 (E.D. Mich. 1977).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 81-1405
81-1498

UNITED STATES OF AMERICA, PETITIONER

v.

RIVERSIDE BAYVIEW HOMES, INC.,
ET AL., RESPONDENTS

[Filed June 8, 1984]

ORDER DENYING PETITION FOR REHEARING EN BANC

Before: MERRITT and MARTIN, *Circuit Judges;* WEICK, *Senior Circuit Judge*

No member of the Court having moved for en banc consideration of this case and the panel being of the view that reconsideration is not warranted, the government's petition, as supported by amicus curiae organizations, is hereby denied.

By an unusual construction of the words "navigable waters" in the Clean Water Act, the government and organizations filing as amicus curiae would apparently have the Court by injunction prevent the owner from using low lying land areas where water sometimes stands and where vegetation requiring moist conditions grows. Such low lying lands would be converted into "navigable waters" by the Court without regard to either their proximity to navigable waters, streams or seas or the inundation of such lands by such navigable

waters. Under such a construction low lying backyards miles from a navigable waterway would become wetlands. Neither the government nor amicus suggests an adequate limiting principle. Such a construction is over broad and inconsistent with the language of the Act in question, and the Court declines to adopt such a construction.

ENTERED BY ORDER OF THE COURT

/S/ John P. Hehman
JOHN P. HEHMAN
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 77-70041

UNITED STATES OF AMERICA, PLAINTIFF,

v.

RIVERSIDE BAYVIEW HOMES, INC.;
ALLIED AGGREGATE TRANSPORTATION COMPANY,
DEFENDANTS.

OPINION AND ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION IN PART

Plaintiff seeks a preliminary injunction restraining defendants from further filling certain land in Macomb County, Michigan, owned by defendant RIVERSIDE BAYVIEW HOMES, INC. (hereinafter referred to as RIVERSIDE), unless a permit is issued for such filling operations by the United States Corps of Engineers.

The property owned by defendant RIVERSIDE consists of two adjacent parcels, one approximately 60 acres which was subdivided and platted in 1916,[1] [Exhibit 39], and an adjacent parcel to the north and east, of approximately 20 acres which has never been platted.[2] RIVERSIDE had already filled a portion of the property, some of it without objection. It is plaintiff's

[1] Water mains and fire hydrants were installed at that time in a portion of the property in dispute.

[2] Defendant ALLIED AGGREGATE TRANSPORTATION COMPANY is a contractor engaged in hauling dirt to the site. If RIVERSIDE is enjoined the injunction will extend to it as well since it claims no independent right to fill.

position that all of the unfilled property to the south and east of the present fill is a "wetland" as defined by the regulations adopted by the Corps of Engineers pursuant to authority granted under the Federal Water Pollution Control Act, Title 33, United States Code, section 1251, *et seq*. This statute grants to the Corps of Engineers, acting on powers delegated by The Secretary of the Army, authority to regulate and either permit or refuse to permit fill to be placed on certain land. Plaintiff relies specifically on subsection (h) of paragraph (d)(2)(i) of the Regulations. Paragraph (h) provides:

> Freshwater wetlands including marshes, shallows, swamps and similar areas that are contiguous or adjacent to other navigable waters and that support vegetation. "Freshwater wetlands" means those areas that are periodically inundated and that are normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction."

Numerous witnesses testified at hearings held January 13, 15, 17, 19, 20, 21, and 22; voluminous exhibits were presented to the Court. At the request of all parties, the Court viewed the area in question on Saturday, January 22, 1976.

Several of the Government's witnesses testified that vegetation now in the property is wetland vegetation; i.e., it requires saturated soil conditions. Indeed, defendants' witnesses conceded that there was wetland vegetation. The only dispute between the witnesses was as to the classification of the wetlands. Based upon all of the evidence, the Court finds that the unfilled portion of the property is now "characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction."

The Court further finds that the property is contiguous to a navigable water, namely Black Creek, a tributary of Lake St. Clair. Defendants' property is sepa-

rated from both Black Creek and from the man-made channels of Savan Drain which connect with Black Creek by approximately 200 feet at the southeast corner, where a north-south drain which connects to the Savan Drain approaches the closest to defendants' property, and by two ten-acre parcels along the south boundary. This area which separates the legal boundaries of defendants' land from the navigable waters of Black Creek and the canals and drain is also "characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction." In determining whether an area is contiguous, the Court must look at whether the wetland type vegetation continues to the navigable waters. Any other interpretation would permit a landowner of contiguous and adjacent wetlands to deed a ten-foot strip between the navigable water and his property to some third person and then claim that the wetlands were no longer contiguous or adjacent.

Sharply conflicting testimony was offered by plaintiff's experts and RIVERSIDE's expert as to the reason for the "prevalence of vegetation that requires saturated soil conditions for growth and reproduction." Plaintiff's experts were of the opinion that the water in Lake St. Clair, Black Creek and the canals or channels and the overflow from the same were the principal causes of the prevalence of such vegetation. None of these witnesses, however, were soil experts and none had done any definitive tests on the soil. Only one expressed an opinion as to the type of soil (he testified it was muck), but this was based on visual inspection and not, by his own admission, on laboratory tests which would be the appropriate scientific method to use.

Mr. Thomas P. Gough, Macomb County Public Works Commissioner and formerly District Commissioner of the United States Soil Conservation Service, testified that the reason for the prevalence of wetland

type vegetation on this particular property was the type of soil found on the property and not its proximity to Lake St. Clair, Black Creek or any canals feeding into them. Based on studies done by the Department of Agriculture in 1968, Soil Survey, Macomb County, Michigan, Exhibit 28, he testified that the soil on the property in question was Lamson soil, not muck or marsh, and that type of soil would and does support "vegetation that requires saturated soil conditions for growth and reproduction" whether it is found near Lake St. Clair or several miles inland. He testified that the nearness of the lake and the canals had no hydrological effect on the soil beyond a 50 to 100-foot distance. The Court finds his testimony logical, based upon knowledge and qualifications superior to that of the plaintiff's expert witnesses, and accepts it. Thus, it finds that except for such portions of the property as have been inundated and then only for the period of inundation, the contiguous navigable waters have not contributed to the wetland type of vegetation on defendants' property.

The 20-acre parcel of defendants' property is directly south and across the River Road from the Clinton River. River road is a raised road bed. Mr. Gough testified that the water in the river was not the cause of the prevalence of existing vegetation in the 20 acres for the same reason; i.e., that it does not drain well, that Lamson soil is characterized by high water table and water near the surface, and if it is tiled, tiles must be no more than 100 feet apart since the water will not pass through such soil a distance of over 50 feet. The Court also credits this testimony and so finds.

The regulation under which the Corps of Engineers claims jurisdiction requires not only wetland vegetation but also that the area be "periodically inundated."

This is the most difficult issue to resolve in determining whether RIVERSIDE's property is subject to the

permit requirement of the statute. Is it "periodically inundated" by water from Lake St. Clair, the Black River or the canals? Inundated, of course, means flooded, and is easy of definition.[3] Periodic, however, is much more difficult. The instant regulations were adopted in haste following a decision by the United States District Court for the District of Columbia in *NRDC* v. *Callaway: et al.*, 392 F. Supp. 685 (1975), (Aubrey Robinson, J.) holding that the previously adopted regulations were insufficient to cover the statutory objective. The Corps of Engineers published in Vol. 40, No. 88, Part I, Federal Register for May 6, 1975, four alternative sets of proposed regulations. As noted there, because of the time constraint of the District Court's order, the Agency was not "able to prepare an environmental impact statement pursuant to the National Environmental Policy Act and the Guidelines of the Council on Environmental Quality." Perhaps for the same reason of haste, the regulations do not define periodic when dealing with inundation of fresh water wetlands. When defining other terms, such as "ordinary high water mark" with respect to inland fresh water, the regulations are quite specific. 209.120(d)(2)(h)(ii)(a) states that it "is established as that on the shore that is inundated 25% of the time." Where specific data is not available, it can be estimated by the characteristics of the area.

The dictionary definition of "periodic" and the noun from which it derives, "period" are helpful but not con-

[3] Websters New International Dictionary, Second Edition, Unabridged, defines inundate as follows:

1. to cover with a flood; to overflow; deluge; flood.
2. to fill with an overflowing abundance or superfluity; as, the country was inundated with bills or credit. Synonim = overwhelm, submerge, drown.

clusive. Websters, *supra*, defines "periodic, as applicable here as follows:

1. Of, pertaining to or performed in a period, or regular revolution of a heavenly body, as a planet's periodic time or motion.
2. Characterized by periods, occurring at regular stated times, acting, happening, or appearing at fixed intervals; loosely, recurring; intermittent; as periodic epidemus.
3. Consisting of a series of stages or processes, which is regularly repeated; as a periodic vibration.

It also defines:

Periodic Curve—
Math and Physics. A curve formed by the continued repetition of some part of itself.
Periodic motion—
Physics. A recurrent motion in which the intervals of time required to complete one cycle and begin another are equal.
Periodic star—
Astron. A variable star whose changes in brightness occur at fixed periods.

Period is defined as:

4. A portion of division of time. Specif.: a. A portion of time as limited and arranged by some recurring phenomenom, as by the completion of a revolution of a heavenly body; a division of time, as a series of years, months or days in which something is completed, and ready to recommence and go on in the same order; cycle; tidal periods; the annual period of Uranus.
17. *Physics & Elec.* The interval of time required for a periodic motion or phenomenon to complete a cycle and begin to repeat itself; as, the period of a pendulum or of an oscillatory or alternating current. The period in seconds

equals one divided by the frequency in cycles per second.

Turning then to the periods in which the land has been inundated, the evidence established the monthly mean water levels of Lake St. Clair. It was also established that the level of Lake St. Clair would control the level of Black Creek and the canals or channels in the area of the property belonging to defendants. This level has varied from a high in 1973, of 576.6 feet to less than 571 feet.

The testimony of Mr. Benjamin DeCooke was that the mean of Lake St. Clair's monthly mean water levels in 573.15 feet. He also stated that the mean high water level of the lake, a level that is one standard deviation above the mean, is 574.4 feet. The lake would be at or above its mean high water level about 16 percent of the time. He further testified that the normal distribution of Lake St. Clair water levels was such that a level of 575.0 feet would be two standard deviations above the mean; this level would be reached or surpassed about two percent of the time. See *United States Department of Commerce, Handbook of Mathematical Functions 968* (Applied Mathematics Series No. 55; 1964).

Mr. DeCooke further testified that the water levels for a month normally varied six inches up or down from the mean. The greatest recalled high from the monthly mean was, he testified, one and one-half feet. Although there is no contour map of defendant's property, there are maps providing a number of elevations from 580.20 to 574.81 [Exhibit 59]. The mean of the elevations on the south and east of defendants' property is 574.6, ranging from 575.70 to 574.45. Using the monthly mean level of Lake St. Clair in Exhibit 52, and adding six inches, the normal variation, it is immediately apparent that there have been long periods of time when none of the property was inundated by water from contiguous or adjacent navigable waters. Indeed, this has been

true most of the time. Recent high water levels (1973-1975) have been the highest since Lake St. Clair levels were first recorded in 1897. Using the average elevation of the most southerly and easterly boundaries of BAYSIDE properties of 574.6, there have been periods in only 14 of the 80 years of recorded lake levels in which the monthly mean inundated the property,—or, 17% of the time. Some of the higher elevations have been inundated only during the last recent unprecedented high water or have never been inundated.

What case law there is on the subject of periodic inundation is not helpful in the instant case. In *United States* v. *Holland*. 373 F. Supp. 665 (M.D. Fla., 1974), the Court found certain mangrove swamps periodically inundated where the United States Geological Survey tide gauge data indicated that 50-100 tides exceeded two feet in the subject water each year. This frequency and yearly occurrence clearly indicates a conclusion that it was periodic. The evidence in the instant case disclosed that portions of defendant's property had been farmed in past years [testimony of Harry Helger and Exhibits 26 and 2.

In *United States* v. *Golden Acres, Inc.*, E. D. N. Car., Jan. 13, 1977, No. 76-0023-Civ-4, the Court found the property (on the Intercoastal Waterway) inundated in periods of storms [Finding 6]. Although there is no express finding of how often these storms would occur, it may be presumed that they would at least occur annually.

Clearly, a single inundation would not be periodic, nor would two. Here, as to certain portins of the land, there have been three inundations in eighty years. They have been at, roughly, 20-year intervals, but not in accordance with any fixed cycle or certain duration.

The Corps of Engineers has apparently adopted an elevation of 575.7 as the level below which it claims jurisdiction [Exhibit 59]. However, no evidence was

offerred as the basis for this decision. If the level of 575 is adopted it would not have been exceeded since recording the lake levels in Lake St. Clair began in 1897 until 1929, when the lake level reached 575.7 and exceeded 575 for three months. The next time 575 was exceeded was in 1951 and 1952, then, again, in 1969, and finally in the 1972-1975 unprecedented high-water period when many, many established homes and subdivisions were inundated. If the Corps of Engineers' figure of 575.7 were adopted, it would have been exceeded only in 1973-1974, the years of unprecedented high-water levels in the Great Lakes. Although the inundation lasted for several months, the Court believes the period should be considered as a unit. Considering the history of the water levels presented to the Court, this period of flooding is not "periodic". It constitutes less than 2% of the time that the lake levels have been recorded.

The Court is left in the unenviable position of having to define "periodic" without knowing the reason for the adoption of this standard. Counsel for the Government has argued that it is to conserve the wetland for habitat of wetland creatures. Yet, this regulation does nothing to prevent defendant from tiling the area so that except during the brief periods it is inundated wetland vegetation could not survive. Indeed, counsel for defendant urges that periodic inundation means inundated sufficiently often so that the inundation is the reason for the presence of wetland type vegetation. That standard has a rational basis but is not the one stated in the regulation. In the Court's opinion, something that has occurred less than five times in the last 80 years cannot be said to have occurred periodically. If treating the years 1972-1975 and 1952-1953, as one occurrence, then the lake levels have exceeded 575 feet only four times (1928, 1952-1953, 1969 and 1972-1975). If the level of 574.9 feet were to be considered, the number of occurrences would increase to six. From this it is clear that determining the level at which the inundation would be considered "periodic" is difficult and perhaps somewhat arbitrary. The Court must choose the point at which an occurrence became periodic. It has selected more than five. It therefore determines that the appropriate level is 575 feet, plus the half-foot of normal monthly fluctuation above the mean. The Court, therefore, hereby enjoins the fill of all land south and east of a contour line of the elevation of 575.5. If there are pockets of lower-lying lands entirely within this contour line, they may be filled. All fill is enjoined, however, until a survey has been made and filed with the Court, and the Government has had a reasonable opportunity to object to its accuracy. Defendants may, of course, apply for a permit to fill any additional land.

/s/ Cornelia G. Kennedy
CORNELIA G. KENNEDY
United States District Judge

Dated: FEBRUARY 24, 1977
Detroit, Michigan

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 77-70041

UNITED STATES OF AMERICA, PLAINTIFF,

v.

RIVERSIDE BAYVIEW HOMES, INC., AND
ALLIED AGGREGATE TRANSPORTATION COMPANY,
DEFENDANTS.

[Filed June 21, 1979]

OPINION OF THE COURT

The evidence heard during the motion for preliminary injunction was admitted under Rule 65, F.R.Civ. P., as part of the record in the trial of this action. The court's findings of fact and conclusions of law on that motion are also incorporated herein by reference.

At the time of the hearing on the preliminary injunction Mr. Thomas Gough, Macomb County Public Works Commissioner and formerly District Commissioner of the United States Soil Conservation Service, was qualified as an expert witness and testified that in his opinion there was no hydrological connection between Lake St. Clair and the land in question owned by defendant Riverside. The only additional evidence offered by the parties at the trial related to this factual issue, i.e., is there a hydrological connection between Lake St. Clair (the Clinton River and the Black River) and the land in question.

Subsequent to the hearing on the motion for preliminary injunction and prior to the trial, the plaintiff obtained a discovery order permitting it to make borings on the property. The manner in which the holes were dug, elevations established, etc. is also contained in the deposition of Arnold J. Rybak taken December 6, 1977, which was received in evidence by stipulation of the parties (Exhibit 93). The results of these tests, and the manner in which the field investigation was performed including the location of the holes is summarized in Otto deposition exhibits 2 and 3 which were received in evidence by stipulation.

By stipulation the deposition of William C. Otto, an employee of the Corps of Engineers, was also received in evidence. Mr. Otto has a B.S. in Civil Engineering from Notre Dame University, had extensive experience as an engineer, both with the United States Navy and other employers before joining the Corps. His experience included designing installations such as airfields and dry docks where soil stability was an important factor. Since 1957 he has been Chief of Foundations and Materials for the Corps which deals with all phases of design of permanent sea-beach bearing capacity piles and has made studies of ground water control, stability of slopes, etc. He testified that the engineer's interest in soil differs from that of those interested in agricultural characteristics, since the engineer is interested in the flow of water at deeper depths and in the bearing capacity of the soil. Mr. Otto directed the location of the boring holes made in defendant's property. He also testified in greater detail about the manner in which the soil samples were taken from the boring holes and it was he who determined the type of soil taken at the various levels of the borings. He also noted the elevation at which water was first observed in a hole and recorded the height to which it rose in the respective holes and the period of time it took to do the same. Two

sets of three holes each were made. Each hole in a set was 100 feet from the nearest hole. He described the soil as loose black organic sand with fibers (p. 28, Otto deposition). He testified that the soil taken from the holes would be classified as Lamson soil.

It was Mr. Otto's opinion that there was "a definite connection between the lake (Lake St. Clair) and the holes" (Otto deposition transcript 33) in that the water in the subsurface soils was connected to the lake and the river (Clinton River). It was Mr. Otto's opinion that the soil was a mottled sand and clay, and that the sand was inter-disbursed all through the soil providing paths for the water to go up through the soil from water bearing sand below (Otto deposition transcript 37). He testified that Lake St. Clair and the Black River would act as hydraulic heads providing pressure to force water through the soil. When asked whether the water which came up in the holes could be draining toward Lake St. Clair and the Clinton River, Mr. Otto testified that it was not, because the water "came in faster the closer we got to the lake" (Otto deposition transcript 50).

Mr. Gough was recalled by defendants to supplement testimony given at the preliminary injunction hearings and to rebut Mr. Otto's testimony. Mr. Gough testified that if, as Mr. Otto claimed, the water and the holes resulted from a hydrological connection with the lake, the water in each hole should be at the same level, where, as here, the holes are 100 feet apart. He pointed out that this was not the case and indeed in one hole no water had come in. It should be noted that this hole was refilled almost immediately after it was dug. However, in some of the other holes the water was coming in as the holes were being dug. Mr. Gough explained the water in the holes represented the water table of the area and reiterated that Lamson soil simply does not drain more than 50 to 100 feet laterally. The level of

Lake St. Clair on the day on which the holes were dug, was shown to be 574.14 feet. Mr. Gough testified that if there were a hydrological connection, as Mr. Otto opined, hydraulic pressure of the lake would push the water in the holes to that level. He felt it was significant that the water was the highest in the middle hole of the most northerly three holes, while the most easterly of these three holes was closest to the lake. There was almost a four-inch difference in the water level of these two holes, too great a difference in his opinion if the water were there as a result of a hydrological connection with Lake St. Clair. He testified that he would expect the difference in the water levels to be no more than one inch if due to such hydrological relationship. The difference of about six inches in the water levels in the other set of three holes and the absence of water in the third hole in that set was further evidence, he testified, that the water was from the seasonal water table and not hydrologically connected to the lake. The holes were dug in August. It was his opinion that because Lamson soil drained so poorly, it is likely to have a high water table.

Mr. Gough pointed out the presence of homes closer to the lake than the subject property. It was his opinion that if there were a hydrological connection of all the lands in the area with Lake St. Clair, as Mr. Otto testified, that the foundations of these homes would be unstable, which is not the case. In further support of his conclusion he pointed to the effectiveness of the Savan drain (a drain to the south of the property in question) which flows through similar Lamson soil. He noted that there is an effective pumping station on this drain which lifts water 4½ to 5 feet from the west into an extension of the drain to the east where it then flows into Lake St. Clair. He pointed out that if Mr. Otto's conclusions were correct, this water would be flowing back underground because of the hydrological head of

Lake St. Clair, forcing water into the canal above the pump and that the pumping station under those circumstances would merely be recirculating the water.

Mr. Otto was recalled in rebuttal. He testified that there were differences in the permeability of the soil at each boring site. His explanation as to the difference in the water levels in the holes was that the holes were not left open for a sufficient length of time to permit the water to reach the same level and had they been left open a longer period of time the water would have stabilized. It should be noted that defendant did not prevent plaintiff from leaving the holes open for a longer period of time. The holes were filled up for safety reasons at the end of the day on which they were bored. The government had hired the boring rig for only a single day. Mr. Otto found no significance in the presence of homes near the lake. It was his opinion that soil which had such hydrological connection with the lake was suitable bearing soil for a road or homes so long as it was not subject to consolidation. On cross examination, he testified that the soil from the borings would be classified as Lamson soil. Although he conceded that type of soil could have a naturally high water table, he maintained his position that where the soil is permeable and the levels of water the same as the lake, that there is a hydrological connection.

Both Mr. Otto and Mr. Gough had exceptional qualifications and were extremely knowledgeable regarding soils. Further, each was a completely truthful witness in the court's opinion. What the court is faced with is two expert witnesses who simply do not agree in their conclusions. The burden of proof is on the plaintiff and the court finds that it has failed to preponderate on this issue. Indeed it finds the balance tilts slightly toward the defendant Riverside. The reasons given by Mr. Gough for his conclusion are slightly more persuasive than those of Mr. Otto. The difference in the heights to

which the water rose in the boring holes and the significant difference in the rapidity with which some filled with water is more consistent with Mr. Gough's opinion than Mr. Otto's. Mr. Gough seemed more knowledgeable about drainage qualities of Lamson soil and soil in this area. Exhibit 28, "Soil Survey, Macomb County Michigan", issued September, 1971 by the United States Department of Agriculture, Soil Conservation Service, in cooperation with the Michigan Agricultural Experiment Station confirms Mr. Gough's testimony when it states that in Lamson soil the depth to seasonal high water table is less than one foot.

In its opinion and order granting the motion for preliminary injunction, the court found that the waters of Clinton River, Black River and Lake St. Clair do not contribute and "have not contributed to the wetland type of vegetation on defendant's property" except for the periodic inundation. Based upon both the evidence at the preliminary injunction hearing and the additional evidence received at the trial, the court makes the same finding.

Defendants have urged the court to reconsider its previous holding that the Federal Water Pollution Control Act is constitutional. The court believes that its earlier conclusion was correct and that the Act is constitutional.

Defendant also asks the court to withdraw its earlier interpretation of the regulation regarding periodic inundation. The court believes its earlier interpretation set forth in its opinion and order of February 24, 1977 was correct and declines to modify it.

For the reasons stated the court finds that plaintiff is entitled to the injunction prayed for in its complaint.

COUNT THREE—DEFENDANT'S COUNTERCLAIM

The court previously denied the plaintiff's motion for summary judgment with regard to a portion of Count Three of defendant's counterclaim which asked for a de-

claratory judgment that 33 C.F.R. § 209.12(a)-(12)(ii)(b), now revised as 33 C.F.R. 326.4(e) (see 42 Federal Register 37159 (July 19, 1977)) is unconstitutional as a taking of Riverside's property without due process of law. That regulation adopted pursuant to the Water Pollution Control Act states,

> "If the District Engineer refers a case to the local U.S. Attorney or if criminal and/or civil action is instituted against the responsible person for any unauthorized activity, the District Engineer shall not accept for processing any application for a Department of the Army permit until final disposition of the referral action and/or all judicial proceedings, including the payment of all prescribed penalties and fines and/or completion of all work ordered by the court."

The parties have stipulated that Riverside filed an application for a permit to fill the property in question on or about November 15, 1976. The Corps by letter advised plaintiff that it could fill to a marked contour line and later posted the property. When the fill was being dumped beyond this line, the instant action was brought and the court issued a temporary restraining order and later a preliminary injunction prohibiting fill beyond a contour line which differs somewhat from the earlier contour fixed by the Corps. Because of the reference of this matter to the United States Attorney to bring this action, there has been no further processing by the Corps of Engineers of Riverside's application and the Corps admits will be none until the action is concluded and the regulation complied with.

The Corps urges that the regulation does not effect a taking of Riverside's property within the meaning of the law since any injury Riverside may suffer would be compensable, i.e., if there is a taking it may seek compensation in the Court of Claims. Further, plaintiff notes that any hardship Riverside suffers is the result of its own wrong doing. Riverside responds that the

regulation is not rationally related to a governmental purpose, that it chills Riverside's right to enter into litigation with the Army Corps of Engineers, as well as affecting any decision to appeal an adverse judgment, and in so operating the regulation presently deprives the defendant of substantial rights.

The refusal of the plaintiff to process Riverside's application for a permit to fill, based as it is on the specific direction of a regulation, is a final agency action. See *Stanard v. Olesen*, 74 S. Ct. 768, 772 (1954) (Douglas, J., Circuit Justice). The harm continues in both the restriction on Riverside's property rights and more importantly its ability to engage in litigation.

Pursuant to U.S.C. § 706, the Court may review agency action if it finds the agency has acted "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right", may set it aside. 5 U.S.C. § 706(2)(C). In the present case, Congress has not spoken directly on the question of the Corps power to suspend the processing of licenses. The Act provides very generally that the administrator is authorized to promulgate regulations to carry out his functions. 33 U.S.C. § 1361(a). However, it does not appear that this regulation has been promulgated pursuant to any grant of legislative authority. In that part of the Act authorizing legal action against violators, the procedure is spelled out in detail. Sanctions are included, but there is no mention of delaying the processing of permit applications as an appropriate sanction. See, e.g., 33 U.S.C. § 1319 (1344)(s). Where a problem lies within the purview of an agency the United States Supreme Court has generally held that Congress must have intended to give the agency authority to deal with the evil. *Pan American World Airways v. United States*, 371 U.S. 296, 312 (1963). The regulation here, however, does not address a problem peculiarly within the purview of the agency but rather addresses a problem com-

mon to all regulatory and statutory schemes, enforcement. The Administrative Procedure Act provides "a sanction may not be imposed or a substantive rule or order issued except within the jurisdiction delegated to the agency and as authorized by law". 5 U.S.C. § 558(b). The instant regulation has the effect of imposing a sanction not contemplated in the act. Delay of the sort involved in this case is clearly a sanction for it operates to deprive the defendant Riverside of its rights as effectively as any direct action intended to have that effect.

Moreover, Congress has expressed its intent in the Water Pollution control act that "duplication, needless paper work, and delays in the issuance of permits under this section" shall be minimized. 33 U.S.C. § 1344(g); see also 5 U.S.C. § 558(c). A requirment that the processing of permits be halted is inimical to this express purpose of the Act.

The regulation carries a threat of violating constitutional rights. It has serious possibilities of abuse. See *Stanard v. Olesen*, *supra*. In this case the effect of the regulation is to effect a quasi-taking of property unless and until a person relinquishes any right the person may have to engage in litigation with the Corps of Engineers. Had the regulation not existed, there could now be judicial review of final agency action in this matter. If a decision is eventually made by the Corps that the Act does not apply to the defendant Riverside's land or that a permit should be issued, unnecessary damage will have been caused by the regulation. It places the Corps in a particularly advantageous bargaining position in a dispute. Absent a clear congressional directive, a party should not be denied the right to litigate the constitutionality of a statute or regulation on peril of losing its rights to pursue its administrative adjudication remedies. The Corps has adequate means of securing compliance with the statute and regulations

by its right to apply to the United States District Court for injunctive relief as well as the sanctions expressly provided in the statute. The Corps does not need this additional sanction to compel enforcement of its orders.

For the foregoing reason the court declares that the regulation exceeds the Corps' statutory authority and is invalid, and further that it is unconstitutional in that it impedes defendant's access to the court for adjudication of its constitiutional rights.

The remaining counts and allegations of the Counter-Claim were dismissed on earlier motions to dismiss or for summary judgment.

/s/ Cornelia G. Kennedy

CORNELIA G. KENNEDY
Chief United States District Judge

Dated: June 20, 1979
Detroit, Michigan

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 77-70041

UNITED STATES OF AMERICA, PLAINTIFF,

v.

RIVERSIDE BAYVIEW HOMES, INC.,
AND ALLIED AGGREGATE TRANSPORTATION COMPANY,
DEFENDANTS.

[Filed May 10, 1981]

FINDINGS AND ORDER

I

This action having been remanded to this Court by the United States Court of Appeals for the Sixth Circuit and having came before the Court on the parties' Joint Motion for Reconsideration, the following findings are made:

1. Trial for this case occurred before the Honorable Cornelia G. Kennedy between 1977 and 1979.

2. On June 20, 1979, Judge Kennedy issued an opinion finding that the defendant's property was a water of the United States as defined by 33 C.F.R. 209.120-(d)(2)(i)(h).

3. On March 27, 1980, the United States Court of Appeals for the Sixth Circuit, remanded this action for reconsideration in light of new regulations promulgated by the United States Corps of Engineers on July 19,

1977. Those regulations, at 33 C.F.R. 323.2(c), specifically changed the definition of "waters of the United States" to include areas that are "inundated or saturated by surface or ground water at a frequency and duration sufficient to support . . . a prevalance of vegetation typically adopted for life in saturated soil conditions."[1]

After reviewing the evidence presented before Judge Kennedy, as submitted by counsel, and upon a finding that such evidence was adequate to support Judge Kenendy's conclusion that defendant's property is a "water of the United States" as defined by 33 C.F.R. 209.120(d)(2)(i)(h) (1975), this Court concludes that:

1. As redefined by 33 C.F.R. 323.2(c), the Army Corps of Engineers' definition of "waters of the United States" is broader than its predecessor.

2. The facts, as found by Judge Kennedy that defendant's property was periodically inundated; supported a prevalence of wetland vegetation; and was contiguous and adjacent to a tributary of Lake St. Clair, i.e., Black Creek, are sufficient under the new regulations to find that those portions of defendant's property which are below the evaluation of 575.5 feet above sea level are waters of the United States and therefore, subject to jurisdiction under the Clean Water Act, 33 U.S.C. 1344 and the regulations promulgated thereunder.

FURTHER, IT IS HEREBY ORDERED AND ADJUDGED that the defendant Riverside Bayview Homes, Inc. is permanently enjoined from depositing fill or any other pollutants into the waters of Lake St. Clair, the Clinton River, or their adjacent wetlands identified above, or in any other water of the United States, unless and until a permit therefore, has been

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[1] This Court finds that other issues before Judge Kennedy and presently before the Court of Appeals on plaintiffs cross-appeal, No. 80-1116 were not remanded to this Court by the Court of Appeals and therefore, are not before the Court.

obtained under the provisions of the Clean Water Act, 33 U.S.C. 1251 et seq.

/S/ HORACE W. GILMORE
United States District Court Judge

Dated: This 18th day of May, 1981.
Detroit, Michigan

APPENDIX F

The Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.*, provides in relevant part:

33 U.S.C. 1311(a):

Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. 1344(a)

Discharge into navigable waters at specified disposal sites

The Secretary [of the Army] may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

33 U.S.C. 1344(g)(1):

State administration

The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its

jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

33 U.S.C. 1362(7):

The term "navigable waters" means the waters of the United States, including the territorial seas.

Regulations promulgated by the United States Army Corps of Engineers define Clean Water Act jurisdiction in relevant part as follows (33 C.F.R. 323.2(a)-(d)):

Definitions.

For the purpose of this regulation, the following terms are defined:

(a) The term "waters of the United States" means:[1]

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams),

[1] The terminology used by the CWA is "navigable waters" which is defined in Section 502(7) of the Act as "waters of the United States including the territorial seas." For purposes of clarity, and to avoid confusion with other Corps of Engineers regulatory programs, the term "waters of the United States" is used throughout this regulation.

mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travels for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under this definition.

(5) Tributaries of waters identified in paragraphs (a)(1)-(4) of this section;

(6) The territorial sea;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) (1)-(6) of this section. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

(b) The term "navigable waters of the United States" means those waters of the United States that are subject to the ebb and flow of the tide shoreward to the mean high water mark and/or are presently used, or have been used in the past, or may be susceptible to use to transport interstate or foreign commerce. (See 33 CFR Part 329 for a more complete definition of this term.)

(c) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do sup-

port, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.

(d) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."